Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1997

Julian R. Mc Dermott and Carol L. Mc Dermott — *Petitioners*

v.

THE UNITED STATES OF AMERICA, acting through the Commissioner of Internal Revenue — *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner Proceeds Pro se

41 pp

QUESTIONS PRESENTED

Summary Background. The taxpayer overpaid personal income taxes in 1986 and 1987 by a total of $7,040.55. The IRS concedes this, but refuses a refund on the grounds that the taxpayer's 1987 return was received December 9, 1991 which is more than three years after the filing deadline of October 15,1988. Taxpayer responds that the December 1991 return was the fourth time this return was filed, contending that most likely the IRS misfiled the previous three filings, or the IRS computerized reporting is in error.

The Taxpayer offered a variety of evidence that he made previous filings but was unable to produce a certified mail receipt. The IRS and District Court (affirmed by the First Circuit) determined that a certified receipt is the only acceptable evidence, rejected the other evidence, and dismissed the case for lack of a genuine question of fact as to whether previous copies of the return were filed.

Question 1. Section 7502 of the Internal Revenue Code and ensuing regulations provides that a receipt for certified mail is to be taken as prima facie evidence of mailing of a Federal Income Tax return. The question is whether this section is to be interpreted that a mail receipt is the only means of proving filing of the return. That is, in the absence of a receipt, are other types of evidence still admissible, as they were before this section of the code was added.

Given that evidence other than a mail receipt can be presented, there are the following additional questions :

Question 2. The taxpayer proposed evidence to the court other than the return receipt ("extrinsic evidence"). This was never fully presented or reviewed because presentation of the evidence at a trial was barred when the District Court made a summary judgement on the basis of (1.) above. The question is "Where is the threshold at which there is considered to be a genuine question of fact, entitling the taxpayer to a trial on the evidence?"

Question 3. The taxpayer submitted an affidavit in which he asserted that he mailed not one, but several copies of the return. The Government responded with it's own documentation that there was no record. The question here is whether the taxpayer has the entire burden of proof. In the absence of proof by the taxpayer, is the IRS assumed to be right, or should it be left to a jury to decide who is most credible?

Question 4. The taxpayer's appeal of the District Court decision was focused on question 1: Whether evidence other than a certified receipt could be admitted. The circuit court decision appears to make a determination of fact rather than addressing the question of law that was the basis of the appeal, concluding that: The taxpayer failed to show that he mailed the return. The taxpayer never received an opportunity to fully present extrinsic and circumstantial evidence because it was rejected at the district level. Question 4 is therefore whether the appeal review procedure was proper in that it never evaluated the basis of the district court decision being appealed.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Repeated:

Plaintiffs

Julian R. Mc Dermott
and Carol L. Mc Dermott
pro se

hereinafter referred to as the "Taxpayers"

Defendant

United States of America
acting through
the Commissioner of Internal Revenue

hereinafter referred to as the "IRS"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, Case no. 97-1881 entered March 18, 1998 appears at Appendix page A-9 to this petition and is unpublished.

The opinion of the United States District Court for the District of Massachusetts in Civil Action No. 95-11499-PBS entered July 3, 1997 appears at Appendix page A-1 to this petition and is unpublished.

JURISDICTION

This case is proposes for review a decision of the First Circuit Court of Appeals.

Decision entered March 18, 1998

No petition for rehearing was filed in this case

Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States,
   Article IV Section 2
   " The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. Constitution of the United States, Amendment VII

   "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law".

3.U.S. Internal Revenue Code

   Sections 6511, 6513, and 7502 SEE Appendix, page A-12

STATEMENT OF THE CASE

The taxpayers filed a return for their 1986 Federal Income taxes which asserted an overpayment of $5000.00. In the return, they elected to have this amount applied to their 1987 taxes. Neither the overpayment amount nor the timely filing for 1986 is disputed by the IRS. In their 1987 Federal Income tax return the taxpayers claimed a $2040.55 overpayment which, added to the 1986 monies came to a total refund due of $7040.55. The correctness of this amount is not in dispute either. This case arises because the IRS asserts that the 1987 return was not filed timely, depriving the taxpayers of both the 1986 and the 1987 refunds.

The taxpayer asserts that he made an initial filing of the 1987 return in late 1988. After receiving no refund for several months, he inquired and was told by the IRS that the return had not been received. He made a second filing in mid 1989. Instead of the expected refund, a letter came from the IRS which included the phrase "If we have misplaced it [the referenced return we are sorry, but we must ask you to file again." Thence to a third filing, this time certified. Again, no refund. Finally, the taxpayer was instructed in a succession of telephone discussions to file to two additional addresses, one of them a "problem resolution office". This time one of the returns was acknowledged. Only, now the IRS contended that it was too late and denied the refund on that basis.

The IRS contends that the filing date of the 1987 return was December 9, 1991 which is more than three years after its due date (October 15 1988 - due to extensions granted). Were this to be the case, section 6511 of the Code would preclude a refund.

The issue in this case then, is whether there were filings previous to the one acknowledged by the IRS.

Mr. McDermott, the taxpayer, submitted an affidavit asserting that he personally made the three preceding mailings. He claimed that the certified receipt for the third filing was lost in the turmoil of moving his possessions during his divorce in 1991-1992. He offered corroborating evidence as follows:

1.) A legal document (Divorce agreement) which refers to the expected refund as if the return had been filed, and allocates the receipts between the divorcing husband and wife.

2.) An affidavit from the law firm that represented the husband in the divorce attesting that the agreement was in existence prior to October 15, 1991 (The operative deadline for claiming the 1987 refund under code section 6511).

3.) Two requests for extension of time to file the 1987 return which were, themselves, timely filed.

4.) A letter from the IRS relating to the 1987 return which itself admits to the possibility that the return might have been misplaced.

5.) A handwritten copy of the original filed return bearing the date October 13,1988 and signatures.

6.) Copies of cover letters Mr. McDermott wrote to the IRS attempting to track down the missing refund.

There was additional evidence available which was documented in the IRS documents produced during discovery. This evidence was not featured in the brief relating to summary judgment because it was circumstantial and because the issue proposed in the IRS motion for summary judgement was narrow, focusing purely on the need for a Registered/Certified mail receipt or the postmarked envelope as the exclusive means of proving timely mailing.

The circumstantial evidence is as follows:

7.) The fact established from the IDRS transcripts furnished by the IRS during discovery that the Taxpayer has timely filed all other tax returns since 1981. This includes the 1988 return (filed October 15, 1989 per extensions); the 1989 return (filed October 15, 1990 per extension), and the 1990 return (filed April 15,1991). All of these later returns were filed before the December 9, 1991 date the IRS claims the 1987 return was filed (untimely).

8.) Evidence that the IRS has lost the Taxpayers' return before: A letter from the IRS thanks the taxpayer for additional information furnished for the 1980 return, while at the same time the IRS states in a letter (two years later) that they have no record of the 1980 return.

After discovery was complete, the IRS introduced a motion for summary judgement. The IRS argument was that section 7502 of the code is now the only means by which a taxpayer may prove filing of a missing return. Section 7502 states (in conjunction with regulations) that a receipt for registered or certified mail is to be taken as prima facie evidence that the return was delivered and that the date on the receipt is the filing date.

Previous to the insertion of section 7502 in the code, there were many cases of taxpayers trying to prove that they had filed missing returns. They offered a variety of evidence, including in some cases, certified receipts. The Internal Revenue service contested these cases, even some where a receipt was offered. This Taxpayer has argued that, while section 7502 was highly desirable in that it cleared up many cases, it was never intended to deprive the taxpayer of an opportunity to prove filing based on other types of evidence ("extrinsic" directly relating to the missing return; otherwise circumstantial).

The Federal District Court for Massachusetts agreed with the IRS and granted a summary judgement, since no mailing receipt had been produced (See judgement, Appendix page A-8, last sentence).

The Taxpayer appealed to the First Circuit Court of Appeals. During the appeal process, cases from the Eighth and Ninth Circuits were cited by the Taxpayer wherein extrinsic evidence of filing of the return was permitted, overturning summary judgements. The IRS responded by citing cases from the Second and Sixth Circuits asserting that code section 7502 is now the exclusive means of proving filing.

In its decision in March of this year, the First Circuit Court of Appeals affirmed the district court ruling without specifically affirming the postmark exclusivity proposition which was the basis for the district court judgement. Instead the First Circuit decision concluded with a judgement of fact:

> " In response to the government's showing that the appellant had no evidence that his return was filed on time, he was required to adduce specific facts which could reasonably support a decision in his favor. ....At a minimum he would have had to show that he timely and properly mailed his claim. He did not discharge this obligation. "

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REASONS FOR GRANTING THIS PETITION

In Summary.

1. Relating to question (1.)The Federal Eighth and Ninth Circuits have ruled that a certified mail receipt is not the exclusive means of proving that a return was mailed; and that in the absence of a receipt, extrinsic evidence may be used (As was the practice under prior law).

On the other hand, the Second and Sixth Circuits have ruled that Code section 7502 makes a mail receipt the exclusive means of proof.

This case should be reviewed because

(a) Taxpayers in these United States are not receiving equal protection of the laws inasmuch as the law is being interpreted differently depending on where the taxpayer resides; and

(b) With the filing of over 50 million returns every year, accounting for lost and delayed returns is an issue that affects a large number of citizens.

2. Constitutional rights such as trial by jury need to be continually reaffirmed.

It has become firmly established by precedent that this right applies only to determination of questions of fact.

Moreover, it must now be a "genuine" question of fact, which is taken to mean that mere assertions by one side do not entitle them to a trial.

With this circuit court decision, we are moving further to disregard various evidence offered, still within the rubric of a "genuine" question.

The trend toward an erosion of the seventh amendment here is clearly evident and should be curbed.

3. The presumption that the assertions of the IRS are to be taken as the factual truth except when the taxpayer can conclusively prove otherwise puts an unfair burden on the taxpayer who lacks the legal resources of the IRS to begin with. That this is a national concern is attested to by recent attempts by Congress to legislate on this issue. This case gives the Court an opportunity to express itself on this matter.

Argument Organized by Question Presented.

Argument on Question 1. The question of whether a postmarked cover or Registered/Certified mail receipt is the exclusive means of proving timely mailing of a tax return is raised in the last sentence of the district court decision being appealed (this petition, page A-8):

> "The Court concludes that under the heightened standard of proof in section 7502 of a postmark stamped on an envelope, Mr. Mc Dermott's testimony is insufficient to raise a genuine issue of fact regarding the date(s) on which the McDermotts' 1987 tax return was filed."

Our contention is that there is no "heightened standard of proof". Section 7502 was intended to help the taxpayer, not raise additional obstacles. The Eighth and Ninth circuits have followed this line of reasoning. For example :

> " .. the language of section 7502 does not set forth an exclusive limitation on admissible evidence to prove timely mailing and does not preclude application of the common law mailbox rule".

Anderson v. U.S. 966 F. 2d 487 (9th Cir. 1992) at 489:

Also, " Admissibility of extrinsic evidence to prove timely mailing of a tax return is a question of first impression in this circuit. Other circuits have addressed the issue but are divided on how to interpret 26 U.S.C. Sect. 7502 (1988)."

Anderson, Id. At 489

"Statutory presumptions that documents are received by the Internal Revenue Service on postmark date on document or certified or registered receipt are not exclusive; common law presumption of delivery upon proof of mailing still exists."

Lee Brick and Tile Co. v. United States,
132 F.R.D. 414 (M.D.N.C. 1990) p419
also Curry v. C.I.R., 571 F.2d 1308

"Document could not be found but the taxpayer produced evidence in the form of the postmaster actually testifying that the document was posted prior to the expiration of the limitations period"

Estate of Wood v. Commissioner of Internal Revenue
909 F.2d 155 cited in Lee p 419

"Nor does the statutory scheme indicate that subsection (c) should be read with such exclusivity. This is especially true when we suppose, as we must, that Congress knew of the common law presumption of delivery. Thus, as we have indicated, if Congress intended that subsection (c) was to be the exclusive instance in which a presumption of delivery could apply, we think that it would have said so. Given that Congress presumably intended that section 7502 would operate to alleviate hardship, for the benefit of the taxpayer, we

think that subsection (c) is better read as a safe harbor which does not exclude application of a presumption of delivery in those cases in which the terms of the statute are otherwise met."

Estate of Wood v. Commissioner of Internal Revenue 909 F.2d 155 (8th Cir. 1990) at 1161.

"A taxpayer may rely upon extrinsic evidence, i.e. evidence other than a postmark or postal receipt for registered or certified mail in order to prove the date on which she mailed a return or other document to the IRS"

Johnson v IRS 888 F. Supp. 1495 (C.D. Cal 1994) at 1506.

"[A]bsent a clear manifestation of contrary intent, a newly enacted statute is presumed to be harmonious with existing law and its judicial construction."

Johnson v. First National Bank of Montevideo, 719 F.2d 270, 277 (8 Cir. 1983).

The position of the Second and Sixth circuits, which upholds a postmark as exclusive, can be found, for example, in Deutsch v. Commissioner, 599 F.2d at 44 (2d Cir 1979) and Surowka v. United States, 909 F.2d 148 at 149 (6th Cir. 1990). Detailed review of these cases is differed to a full brief.

Argument on Question 2. If the Court will consider the petitioners' argument on question 1, admitting extrinsic evidence, there will then be raised the question of whether there is enough evidence to preclude summary judgement.

What should this evidence show?

Extensive law prior to the passage of code section 7502 (and some since) has been eclipsed by the attention to postmarks following 7502. The prior body of statute and case law established :
First, that evidence of physical delivery was applicable.
Second, proof of timely mailing creates a rebuttable presumption of delivery (the "mailbox" rule). There appears to be little value to cite many cases here since there has been little recent controversy about the mailbox rule; and since the decisions and briefs by the appellee in this case have focused on the postmark as exclusive proof of mailing, hence filing.

> " The presumption of receipt is a strong one. A finding in opposition to such inference of fact, absent evidence of nonreceipt, is against the weight of the evidence..... It follows that the proof of regular mailing, in time to reach the collector, in due course of mail, within the statutory filing period, was sufficient to support a finding that the return was timely filed"

Crude Oil Corp. v. Commissioner,
161 F.2d 809,810 (10th Cir)

We therefore move now to the major issue in question 2, the standard for summary judgement.

Substantial precedent has been established to the effect that a party to a lawsuit is not entitled to a jury trial when the sole evidence for his case consists of his own testimony (But, see question 3 argument, below).

In the district court decision, there appears the statement (See page A-6) :

> "the McDermotts offer no proof of the date of the postmark to demonstrate that they timely mailed their 1987 tax, except Mr. McDermott's testimony that he first mailed the 1987 tax return "in late '88 or early '89."

Also, cases are repeatedly cited (pages A-4 and A-7) where summary judgement was granted when the taxpayer relied only on his own testimony to evidence filing a return which turned up missing: Rogers v. Fair, 902 F.2d 140; Washton v. United States, 13 F.23d 49 (2d Cir. 1993).

Unless all evidence is to be deemed nonadmissible on the premise that only a postmark is acceptable, the statement made in the decisions (pages A-7, A-11) that there is no evidence other than the Taxpayer's assertion is incorrect. It is true that the Taxpayer was not able to locate the certified mail receipt which he obtained from the third submission of his tax return. However, there were six items of evidence submitted (listed , page5) which corroborated in one way or another his sworn assertion that he did indeed timely file the 1987 return. There were also two additional items of evidence brought to light which were circumstantial (Page 8). One of these items shows that the Taxpayers are on record as having filed the returns for 1988, 1989, and 1990 before the date when the IRS claims they filed the 1987 return. How would it make sense that the taxpayer would jeopardize a $7 thousand refund by waiting to file for 1987 until after three subsequent returns were in?

Only in the Second and Sixth circuits, where evidence was swept away by insistence on a postmark, have taxpayers suffered summary dismissals in this type of case. Elsewhere, there is substantial opinion that summary judgement should not be used where there is minimal countervailing evidence:

> "To succeed [in a motion for summary judgement], the nonmoving party must show that there is an absence of evidence to support the nonmoving party's position.", Rogers v. Fair, 902 F.2d 140, 143(1st Cir. 1990 ;also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

"If there is even a scintilla of evidence presented to support the nonmoving party's position, summary judgment should not be granted"
Browning v Birmingham News, 348 So.2d 455 (Ala. 1977)

"only that the evidence, or reasonable inferences therefrom, furnish a mere gleam, glimmer, spark, the least bit, the smallest trace, in support of plaintiff's complaint."
Wilson v Liberty National Life Insurance Co. 331 So.2d 617.

"The court must "view the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor."
Barbour v. Dynamics Research Corp. , 63 F. 3d at 36 (116 S.Ct 914, 1996)

"Furthermore, on motion for summary judgement, the court has a duty to draw all reasonable inferences in favor of the non-moving party"
Sterling National Bank and Trust Co. of New York v. Fidelity Mortgage Investors, 510 F.2d 870 (2nd Cir. 1975)

If all reasonable inferences are drawn in favor of the appellants, one would infer that if the original of the tax return was dated 10/13/88, the return must have been mailed some short time after that (as Mr. Mc Dermott testified) not three years later.

From the Divorce agreement, if Mr. Mc Dermott advanced the money to pay a Real Estate Tax liability (including his divorcing wife's liability) on the basis that he would get the money back as soon as the refund check for the 1987 taxes was received;

an inference in favor of the Taxpayers would be that Mr. McDermott must have already completed the return so to know how much of a refund was due, and mailed the return to claim it.

A third inference that might be drawn in favor of the Taxpayer would be that if the 1988, 1989, and 1990 returns were all timely filed, it is extremely unlikely that the 1987 return, which had a significant refund attached to it, would be left unfiled.

Beyond this, there is the possibility that a jury might decide that the Taxpayer's claim that he mailed the return four times (and accompanying details) is simply more credible than the IRS claim that they never received the return (as opposed to receiving it and misfiling it).

> "Because assessing the credibility and weight of the evidence are questions of fact for the trier of fact, the District Court's grant of summary judgment was improper".

Tippens v. Celotex Corp., 805 F.2d 949 at 955(1 cir, 1986).

> "The Court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment would change the threshold primary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts.."

Anderson op. Cit. At 246, also 241 US App DC at 253.

Argument on Question 3. Recent cases have not been uniformly supportive of the idea that there is a presumption that assertions by the IRS should be taken as true unless proven false.

For example:

> "The government claims that it rebutted this presumption (of delivery, once mailed) by producing records of non-receipt. ..... The district court found Anderson and Brown's statements credible and was not persuaded by the government's rebuttal evidence. In particular, the district court noted that the government admitted losing tax documents that had been mailed and delivered."

Anderson, Id at 492

This situation exists in the present case, where a letter sent to the Taxpayer requesting the return contained the statement: "If we have misplaced it, we are sorry, but we must ask you to file again."

The basic IRS reference document in the present case is the Certificate of Assessments and Payments. Examination of the form furnished by the IRS during discovery shows internal inconsistencies. One could easily adopt the view that the IRS "Certificate of Assessments and Payments", relied on in this case, is just as surely a self serving (IRS's own language from brief) assertion as the Taxpayer affidavit that he filed the return. If the Taxpayer evidence listed on pages 5 and 6 is not admissible, we may very well have a case of "his word against mine" with no corroborating evidence on either side.

> " In order for Internal Revenue Service to rely on presumption of regularity and correctness, it must produce evidence clearly showing that records were not received such as by testimony of IRS record keeping procedures along with production of records and transcripts showing depth of search."

Lee Brick and Tile Co. v U.S. 132 F.R.D. 414 (M.D.N.C. 1990) at 420

None of this was presented by the IRS in the present case.

> " Sam and Beatrice both testified that she signed such consents,...and that Weiss immediately placed them in a properly addressed, stamped envelope and deposited them in the mails. This testimony gives rise to a strong presumption of delivery. .....Respondent's evidence-negative at best-that a search of the various files maintained by the Internal Revenue Service failed to disclose any record of the election and consent forms is not, in our view, sufficient to overcome the presumption of delivery"

Mitchell Offset Plate Service, Inc. v. Commissioner of Internal Revenue 53 TC 235

Argument on Question 4. Items 1 through 6 of evidence listed on page 5 were included in the appendix to the Taxpayers' appeal brief. Circumstantial evidence was not included because it had not been introduced in the brief at the district level. The problem here for the Taxpayers was that it was thought that the various extrinsic and circumstantial evidence could not be brought before the court until a decision was made on whether it was admissible. When the motion for summary judgement was made based on an exclusive requirement for a postmarked mail receipt, there was a perception that the other evidence could not be presented unless the motion was rejected.

Given that the Taxpayers were proceeding pro se, there could be a question as to what latitude the Court is willing to allow with correct procedure. This could be a measure of the degree of commitment the judiciary has to the principle that any citizen of the United States ought to be able to be heard, notwithstanding what financial resources he might have with which to obtain legal counsel. In this connection there might be some allowance given by not denying this petition because of Taxpayers' failure to request reconsideration of the appeal (they did not know this was possible); and the possibility of remanding the case to the circuit court if a writ of certiorari is not issued.

"pro se pleadings should be liberally construed" Haines v. Kerner, 404 U.S. 519-521, 92 S.Ct 596, L.Ed.2d 652 (1972)

CONCLUSION

The Taxpayers pray that this Court will issue a writ of certiorari and eventually restore to them the constitutional right to be heard by a jury to evaluate the question of fact as to whether their 1987 federal income tax return was timely filed.

Respectfully submitted

Joe K McDermott

Date: June 16, 1998

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 95-11499-PBS

JULIAN McDERMOTT, ET AL.
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

ORDER OF JUDGEMENT

SARIS, D.J.

In accordance with the Court's Memorandum and Order dated May 6, 1997, granting #10, motion of the defendant for summary judgement, it is hereby ORDERED

JUDGEMENT FOR THE DEFENDANT,

By the Court,
s/
Deborah L. Whitney, Clerk
(617) 223-9175

July 1, 1977

Pursuant to Fed. R. Civ. P. 77(d), counsel are advised that this order and/or judgement was entered on the docket on July 3, 1997
S/
Deputy Clerk
Date: July 3, 1997

To: All Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JULIAN R. AND CAROL L. McDERMOTT, Plaintiffs	)	CIVIL ACTION
v.	)	No. 95-11499-PBS
UNITED STATES OF AMERICA Defendant,	)	

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGEMENT

May 6,1997

Saris, U.S.D.J.

INTRODUCTION

Pro Se Plaintiffs Julian and Carol McDermott ("the McDermotts") bring this action against the Internal Revenue Service ("IRS") to claim a refund of $7, 040.55 from their 1987 federal income tax return. The government has moved for summary judgement pursuant to Fed. R. Civ. P. 56(b) on the ground that the claim is time barred. The government's Motion for Summary Judgement (Docket No. 10) is **ALLOWED.**

UNDISPUTED FACTS

Drawing all inferences in favor of the nonmoving party, the following facts are undisputed. Julian McDermott, who has a master's degree in engineering and in computer science, is a software engineer and registered stockbroker. Carol McDermott is a nurse.

They were married from 1967 to 1991, when they became divorced. On April 11, 1988 the McDermotts jointly filed an Application for Automatic Extension of time to File 1987 U.S. Individual Income Tax return with the IRS, and on August 15, 1988, jointly filed an Application for Additional Extension of Time to File with the IRS until October 15, 1988. Both requests for extension were granted. Eventually, the McDermotts filed a joint federal income tax return demonstrating a tax liability of $6, 078.00. However, this return also showed that the McDermotts had paid a total of $13,18.55 in Taxes. Thus the McDermotts were due a refund of $7,040.55. The IRS does not dispute that the McDermotts overpaid their taxes by $7,040.55. Rather the dispute centers on whether the McDermotts timely filed their 1987 return.

Mr. McDermott testified at his deposition that he mailed the 1987 tax return in late 1988 or early 1989. However, the IRS has no record of receiving this return. The McDermotts received a letter from the IRS, dated January 28, 1991, which stated that their 1987 return was never received and that the IRS was holding on account an overpayment of $5,000.00 from the McDermotts' 1986 tax return which could only be claimed if their "signed" 1987 return was filed. Mr. McDermott testified that upon receipt of this letter he sent another copy of the 1987 tax return. Approximately six months later, after receiving no refund for their 1987 tax return, they contacted the IRS and were instructed to send yet another copy of their 1987 return to two different addresses. On January 30, 1992 the IRS acknowledged receipt of these returns. However, these returns were not signed and the IRS requested that the McDermotts sign and return a declaration. They did so.

The IRS does not have any record of receiving the tax return until approximately December 9, 1991, more than three years after the deadline.

On April 17, 1992, the McDermotts received notification that the IRS had denied their claim to recover a refund for their 1987 tax return because it was untimely. The McDermotts appealed this denial to the IRS, and when they were unsuccessful, they filed in this Court in order to recover the refund.

DISCUSSION

A. Summary Judgement Standard

" Summary Judgement is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement a s a matter of law. " Barbour v Dynamics Research Corp., 63 F.3d 32 (1st Cir. 1995) (quoting Fed. R. Civ. P. 56), cert. denied. 116 S. Ct. 914 (1996).

"To succeed [in a motion for summary judgement], the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990); see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

"Once the moving party has properly supported its motion for summary judgement, the burden shifts to the nonmoving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Barbour, 63 F.3d at 37 (quoting Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 256 (1986)). "There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for

that party. If the evidence is merely colorable or is not sufficiently probative, summary judgement may be granted." Rogers, 902 F.2d at 143 (quoting Anderson, 477 U.S. at 249-250) (citations and footnote in Anderson omitted).
The Court must "view their facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." Barbour, 63 F.3d at 36.

B. Analysis

The Government contends that the McDermotts' claim for a refund is time barred by 26 U.S.C. sect. 6511(a)1 and 6511(b)(2)(A) because the McDermotts have failed to show that they filed their return no later than October 15,1991.

As background, the statutory scheme governing the McDermotts' claim follows. A return which reflects an overpayment may be considered a "claim for refund" under section 6511(a). See 26 U.S.C. sect. 301.6402-1(a)(5); cf. Oropallo v.United States, 994 F.2d 25,27 (1st Cir. 1993), cert. Denied, 510 U.S.1050 (1994). Accordingly, as the McDermotts' 1987 return reflected an overpayment, it met the requirements set forth in section 6511(a). However, section 6511(b)(2)(A) places a cap on the recovery of a refund in the amount of taxes paid during the previous three years, plus any extensions. Oropallo, 994 F.2d at 27. Specifically, it limits the refund to "the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." 26 U.S.C. sect.6511 (b)(2) (A). While under 26 U.S.C. sect. 6513 (b) (1), plaintiffs' taxes were deemed paid on April 15, 1988, section 6511 (b) (2) (A) takes into account the extensions granted to the plaintiffs and therefore, considers plaintiffs' 1987 taxes paid on October 15, 1988.

Accordingly, if the return was received in December 1991, plaintiffs would be precluded from seeking a refund for taxes deemed paid more than three years earlier on October 15, 1988.

The McDermotts do not contest this statutory lockstep, but strenuously contend they timely mailed the return, not once, but four times. The government contends that the McDermotts may not rely solely on the self-serving testimony of a taxpayer to prove a mailing where there is no evidence of a postmark.

Under the so-called physical delivery rule, a document is generally deemed filed with the United States on the date that it is received. United States v. Lombardo, 241 U.S. 73, 76 (1916). "For purposes of applying the statutory time limits, a request for tax refund is not considered to have been 'filed' until the time the IRS actually receives it." Pitre v. Internal Revenue Service, 938 F. Supp. 95, 97 (D.N.H. 1996). A taxpayer's failure to satisfy statutory time limits constitutes a judicial bar to action for refund. United States v. Dalm, 494 U.S. 596, 602 (1990).

The "statutory mailbox rule" in 26 U.S.C. sect. 7502 deems tax returns and claims received after a filing date to have been delivered on the date of the postmark stamped on the cover in which the return is mailed. The jurisdictions are split on the evidence necessary to prove the date of the postmark. The Second and Sixth Circuits have disallowed the taxpayer's offer of extrinsic evidence to prove when a return is mailed. See Washton v. United States, 13 F.3d 49,50 (2d Cir. 1993) (rejecting taxpayers' claim that they timely mailed their tax return because the taxpayers could not offer anything to support their claims except their own statements that they mailed their return in time);

Carroll v. Commissioner of Internal Revenue, 71 F.3d 1228, 1229 (6th Cir. 1995), cert. denied, 116 S. Ct. 2547 (1996))"a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril"); Surokawa v. United States, 909 F.2d 148, 150 (6th Cir. 1990) (disallowing testimony or other circumstantial evidence as proof of the actual date of mailing).

With hesitation, the Eighth and Ninth Circuits have permitted some extrinsic evidence of postmark. Estate of Wood v. Commissioner, 909 F. 2d 1155, 162 (8th Cir. 1990) ("[t]o obtain then benefit of section 7502, the taxpayer must offer proof of postmark –not mere evidence of mailing - as by the testimony of the postal employee who handled and stamped the envelope"); Anderson v. United States, 966 F. 2d 487, 491 (9th Cir. 19932) (under the common law presumption of delivery, holding that the testimony of the taxpayer and the taxpayer's friend who corroborated taxpayer's claim of timely mailing was sufficient). However, no court has relied solely on the uncorroborated testimony of one taxpayer who himself was unsure of the date of mailing.

The court acknowledges that it is required to hold the McDermotts' pro-se pleadings to "a less stringent standard than that applied to documents drafted by attorneys." Pitre, 938 F. Supp. At 97. However, the McDermotts offer no proof of the date of the postmark to demonstrate that they timely mailed their 1987 tax, except Mr. McDermott's testimony that he first mailed the 1987 tax return "in late '88 or early '89." (McDermott Dep. At 10.) In addition, although Mr. McDermott initially stated in an affidavit that one of the returns was sent by certified mail, he could not produce a receipt despite extensions allowed by the Court. (See Docket Entry on 1/8/97).

The McDermotts have not produced any cover letters or any corroborating testimony other than a separation agreement which references the IRS refund.

Even Mrs. McDermott could not corroborate then mailing. Indeed, in his deposition, Mr. McDermott admitted that the summer of 1991 was a period of "divorce warfare", and that his documents from that time period were in a pile in New York. Thus, the McDermotts have failed to meet even the less stringent requirement imposed by the Eighth and Ninth Circuits. While the IRS can certainly make mistakes and lose documents, Congress has raised the bar for proving that tax refund claims are timely filed. The Court concludes that under the heightened standard of proof in section 7502 of a postmark stamped on an envelope, Mr. McDermott's testimony is insufficient to raise a genuine issue of fact regarding the date(s) on which the McDermotts' 1987 tax return was filed.

ORDER

Defendant's motion for Summary Judgement (Docket No. 10) is **ALLOWED**.

S/
PATTI B. SARIS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1881

JULIAN R. MCDERMOTT
and CAROL L. MCDERMOTT
Plaintiffs, Appellants

v.

UNITED STATES OF AMERICA
Defendant, Appellee

JUDGEMENT

Entered: March 18, 1998

This cause came to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The judgement of the district court is affirmed. See local Rule 27.1

By The Court:
S/ PHOEBE MORSE
Clerk

[cc: Messrs. McDermott, Stern & Ms. Argrett]

[Not For Publication]
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1881

JULIAN R. MCDERMOTT
and CAROL L. MCDERMOTT

Plaintiffs, Appellants

v.

UNITED STATES OF AMERICA
Defendant, Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Patti B. Saris, U.S. District Judge]

Before
Selya, Circuit Judge
Cyr, Senior Circuit Judge
and Boudin, Circuit Judge.

Julian R. McDermott on brief pro se.

Loretta C. Agrett, Assistant Attorney General, Donald K. Stearn, United States Attorney, Robert L. Baker, Attorney, Tax Division, Department of Justice, and David English Carmack, Attorney, Tax Division, Department of Justice, on brief per appellee.

March 18, 1998
(A-10)

Per Curiam. We have carefully reviewed the record and briefs on appeal and affirm the judgement below. The only issue raised below, thus the only issue properly before us[1] is whether summary judgement was improper because the date on which the appellant filed his 1997 tax return was in genuine dispute. In response to the government's showing that the appellant had no evidence that his return was filed on time, he was required to adduce specific facts which could reasonably support a decision in his favor. Anderson v Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). At a minimum, he would have had to show that he timely and properly mailed his claim. He did not discharge this obligation. Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990).

Affirmed. Loc. R. 27.1.

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1) See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

U.S. INTERNAL REVENUE CODE EXTRACTS

U.S. Internal Revenue Code, Section 6511(a):

(a) Period of Limitation on Filing Claim..-Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, ……..

U.S. Internal Revenue Code, Section 6511(b):

(b) Limitation on Allowance of Credits and Refunds. No Credit or Refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund.

(A) Limit where claim filed within three year period. If the claim was filed by the taxpayer during the three year period prescribed in subsection (a) the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return. …….

(B) Limit where claim not filed within the three year period. If the claim was not filed within such three year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

U.S. Internal Revenue Code, Section 6513(a):

(a) EARLY RETURN OR ADVANCE PAYMENT OF TAX. For purposes of section 6511, any return filed before the last day prescribed for filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer ...

U.S. Internal Revenue Code Section 7502 (a)

(a) General Rule

(1) Date of Delivery. If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment as the case may be.

(2) Mailing Requirements. This subsection shall apply only if

(A) the postmark date falls within the prescribed period or on or before the prescribed date

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment) and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other wrapper , postage prepaid, properly addressed to the agency, officer, or office with which the return , claim, statement, or other document is required to be filed, or to which such payment is required to be made.

U.S. Internal Revenue Code Section 7502 (c)

(c) Registered and Certified Mailing.

(1) Registered Mail. For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail.

(A) such registration shall be prima facie evidence that the return, claim, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified Mail. – The secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

(2)

FILED
NOV 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-488

In the Supreme Court of the United States

OCTOBER TERM, 1998

JULIAN R. MCDERMOTT AND CAROL L. MCDERMOTT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners made a timely request for refund of their 1987 taxes.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A10 - A11) is unpublished, but the decision is noted at 141 F.3d 1149 (Table). The opinion of the district court (Pet. App. A2 - A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9) was entered on March 18. The petition for a writ of certiorari was filed on June 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were married in 1967 and divorced in 1991 (Pet. App. A2-A3). On April 11, 1988, petitioners jointly filed an application to extend the time to file their 1987 income tax return. On August 15, 1988, they jointly filed an application for an additional extension of time to file until October 15, 1988. The Internal Revenue Service granted both requests for extension (*id.* at A3). On some date after October 15, 1988, petitioners eventually filed a joint 1987 federal income tax return on which they reported a tax liability of $6078 and payments of $13,118. On that return, petitioners claimed a refund due to them of $7040.55 (*ibid.*).

The Internal Revenue Service denied the refund claim as untimely, however, because the Service did not receive the return until December 1991—which was more than three years after the tax for 1987 was paid (Pet. App. A4).[1] Petitioners thereupon filed this suit for a refund of $7040.55 (*ibid.*).

2. a. Petitioners asserted that their refund claim was timely because their return was first sent to the Service by ordinary mail in late 1988 or early 1989 (Pet. App. A3). The Service, however, has no record of receiving such a return. Indeed, the Service's records show that in January 1991 the agency advised petitioners that it had not received a 1987 return and that any refund associated with that year could be claimed

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[1] All payments of tax by petitioners for 1987 were deemed to have been made on April 15, 1988. See 26 U.S.C. 6513. Because petitioners obtained extensions of time to file their 1987 return until October 15, 1988, they had until October 15, 1991, in which to file a timely claim for refund of tax for 1987. See 26 U.S.C. 6511(b)(2)(A).

only if petitioners promptly filed a timely 1987 return (*ibid.*).

Petitioner Julian McDermott testified in a deposition that, upon receipt of this letter, he mailed the Service a copy of the 1987 return that he claimed he had mailed two years before (Pet. App. A3). He further testified that approximately six months later, when he had still received no refund for 1987, he contacted the IRS and was instructed to send copies of the 1987 return to two different addresses (*ibid.*). The IRS records reveal, however, that the agency did not receive petitioners' 1987 tax return until December 9, 1991—which was 55 days after the statutory deadline for claiming a refund for the 1987 tax year (*id.* at A4). See note 1, *supra*. The IRS thereafter acknowledged receipt of the 1987 return. Because the return had not been signed, however, the agency requested petitioners to sign and return a declaration (*id.* at A3), which they did (*ibid.*). The associated refund claim was thereafter denied because it was untimely (*id.* at A4).

b. The district court granted summary judgment to the United States. The court concluded that petitioners' claim for refund was barred by 26 U.S.C. 6511(a) and (b)(2)(A) because petitioners failed to establish that they filed their return for 1987 no later than October 15, 1991 (Pet. App. A2, A5).

The government's motion for summary judgment was accompanied by (i) the Certificate of Assessments and Payments that reflected the status of petitioners' account for the 1987 tax year, (ii) the deposition of petitioner Julian McDermott and (iii) the declaration of Carol McDermott that she had no recollection of the circumstances surrounding the filing of any 1987 joint federal income tax return (see Pet. App. A8). The evidence on which petitioners sought to rely included (i)

the testimony of Julian McDermott that he had placed the return in the ordinary mail in a timely manner and (ii) the divorce agreement drafted for petitioners in October 1991, which contained a reference to the anticipated tax refund for 1987 (see id. at A7).

Viewing the facts in the light most favorable to the petitioners, the district court concluded that the return was not timely filed (Pet. App. A2, A7-A8). The court noted that, under this Court's decision in *United States* v. *Lombardo*, 241 U.S. 73, 76 (1916), a document is not deemed filed with the United States until the date that it is actually received (Pet. App. A6). The district court recognized that, under the exception to that rule provided by the "statutory mailbox rule" in 26 U.S.C. 7502, "tax returns and claims received after a filing date [are deemed] to have been delivered on the date of the postmark stamped on the cover in which the return is mailed" (Pet. App. A6). The court observed that the courts of appeals have expressed different views as to the nature of the evidence required to prove the existence of a postmark under this statute: the Second and Sixth Circuits have disallowed the use of extrinsic evidence (other than the postmarked envelope itself) to prove when a return was mailed; the Eighth and Ninth Circuits have allowed carefully delineated types of extrinsic evidence. The district court concluded, however, that even under the more expansive interpretation of the statute adopted by the Eighth and Ninth Circuits, the uncorroborated testimony of a taxpayer that he placed the document in the ordinary mail is insufficient to satisfy the statutory mailbox rule of 26 U.S.C. 7502 (Pet. App. A6-A8). Because petitioners' return was not actually filed until after the statutory period of limitations had expired, the court held that petitioners were not entitled to a refund.

3. The court of appeals affirmed (Pet. App. A10-A11). The court held that, to counter the government's proof that it did not receive the return in a timely fashion, petitioners "w[ere] required to adduce specific facts which could reasonably support a decision in [their] favor" and that they failed "to discharge this obligation" (*id.* at A11).

ARGUMENT

The courts of appeals have adopted conflicting interpretations of Section 7502 of the Internal Revenue Code. These different interpretations have produced disparate results on the same basic facts. The proper application of the rules concerning the timely filing of documents with the Internal Revenue Service is a recurring matter of substantial importance to the administration of the tax laws—for those rules frequently determine the substantive outcome of tax disputes. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws. But, the facts of the present case do not present the particular issue on which the courts of appeals have disagreed. Further review of the decision in this case is therefore not warranted.

1. a. The Internal Revenue Code contains numerous filing requirements that specify a time by which the filing must be made. The consequences of a failure to make a timely filing are often significant. For example, as relevant here, Section 6511(a) of the Code provides that any claim for refund of an overpayment of tax must be filed within three years from the time a return was filed or two years from the time the tax was paid, whichever period expires later, or if no return was filed, within two years from the time the tax was paid. 26

U.S.C. 6511(a). Under Section 6511(b)(1), a refund may not be made unless a claim is filed within the period specified in Section 6511(a). 26 U.S.C. 6511(b)(1). Moreover, Section 6511(b)(2)(A) limits the amount of any permissible refund to the amount of such taxes paid within the three-year period immediately preceding the filing of the claim (plus the period of any approved extensions of time to file).[2] Under these provisions, petitioners therefore had until October 15, 1991, within which to file a claim for refund of their 1987 taxes. See note 1, *supra*.

Prior to the enactment of Section 7502 of the Internal Revenue Code in 1954, it was well established that a statutory filing requirement could be satisfied only if the document was both actually and timely received by the "particular officer" specified in the statute. *United States* v. *Lombardo*, 241 U.S. at 78. This requirement has been known as the "physical delivery" rule. See *Anderson* v. *United States*, 966 F.2d 487, 490 (9th Cir. 1992). In *United States* v. *Lombardo*, this Court rejected the contention that "the requirement of a statute * * * that a paper shall be filed with a particular officer, [may be] satisfied by a deposit in the post office at some distant place" (241 U.S. at 78). The Court explained that (*ibid.*):

> [t]o so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files.

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[2] A federal income tax return that shows an overpayment of taxes is treated as a claim for refund. Treas. Reg. 301.6402-3(a)(5).

The Court further stated that (*id.* at 76-77) (quoting with approval the decision below in that case; citations omitted):

> Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed. * * * Anything short of delivery would leave the filing a disputable fact * * *.

Under this "physical delivery" rule, a document that was timely mailed but not timely received was not to be treated as having been timely filed. *Phinney* v. *Bank of Southwest Nat'l Ass'n*, 335 F.2d 266, 268 (5th Cir. 1964). Prior to the enactment of Section 7502, however, some courts had departed from the requirement of proof of "physical delivery" by holding that proof of "due mailing is prima facie evidence of receipt" that may be rebutted by actual evidence of non-receipt (*Crude Oil Corp.* v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952)). In *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d at 268, however, the court noted that, under this Court's decision in *United States* v. *Lombardo*, *supra*, "[m]ailing is not filing."

Against this background, Congress enacted Section 7502 in 1954 to address concerns about the effect of irregularities in postal delivery on the filing of tax documents. H.R. Rep. No. 1337, 83d Cong., 2d Sess., A434-A435 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 615 (1954); *Emmons* v. *Commissioner*, 898 F.2d 50, 51 (5th Cir. 1990); *Miller* v. *United States*, 784 F.2d 728,

730 (6th Cir. 1986); *Sylvan* v. *Commissioner*, 65 T.C. 548, 551 (1975). Section 7502 provides two statutory exceptions to the "physical delivery" rule:

(i) Section 7502(a) addresses the requirement that the document be received in a timely manner. It applies when a document has been "delivered by United States mail" to the IRS on a date "after" it was due (26 U.S.C. 7502(a)(1)) and specifies that a document thus delivered shall be deemed to have been filed with the IRS on "the date of the United States postmark stamped on the cover" of the mailing envelope (*ibid.*). By its terms, Section 7502(a)(1) applies only when the document has been "delivered by United States mail" to the IRS. *Ibid.* The risk that "United States mail" may *not* be "delivered" thus remains on the taxpayer under Section 7502(a)(1).

(ii) Section 7502(c), however, provides a method for the taxpayer to guard against that risk. It provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is to be treated as "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). The statute further provides that the date of registration shall be treated as the "postmark date" of the registered mail (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)). Any taxpayer may thus avoid the risk of non-delivery of ordinary mail simply by making use of registered mail and the provisions of Section 7502(c)(1).[3]

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[3] Pursuant to 26 U.S.C. 7502(c)(2) and 26 C.F.R. 301.7502-1(c)(iii)(*b*)(2), the same provisions applicable to registered mail have been made available for documents sent by certified mail.

b. In the present case, petitioners do not contend that the return actually received by the IRS on December 9, 1991, was "delivered by United States mail to the agency [IRS]" with a "postmark stamped on the cover" of the mailing envelope that was dated before October 15, 1991, when the refund claim was due (26 U.S.C. 7502(a)(1)). Instead, petitioners claim that, on an earlier date, they mailed a 1987 tax return to the IRS which the agency did not receive. In support of that contention, they offered the testimony of petitioner Julian McDermott, who claimed to have mailed a return for 1987 on prior dates. Because those alleged mailings were not "delivered by United States mail to the agency" with a "postmark stamped on the cover" of the mailing envelope, the courts below correctly concluded that the statutory exceptions of Section 7502 to the physical delivery rule are not applicable to this case and that petitioners' belated request for a refund of taxes is therefore untimely.

2. The decision of the First Circuit in this case is consistent with the prior decisions of the Sixth Circuit in *Miller* v. *United States*, 784 F.2d 728 (1986), and *Surowka* v. *United States*, 909 F.2d 148 (1990). In those decisions, as here, the court held that Section 7502 "provides only two exceptions to the physical delivery rule for the filing of tax returns and that a taxpayer cannot invoke the judicially-created presumption that properly mailed material is received." 909 F.2d at 148; 784 F.2d at 730. Accord, *Carroll* v. *Commissioner*, 71 F.3d 1228, 1232-1233 (6th Cir. 1995), cert. denied, 518 U.S. 1017 (1996).

The decision in this case is also consistent with the decisions of the Second Circuit in *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980), and *Washton* v. *United States*, 13 F.3d 49,

50 (1993), in which that court emphasized that the document "must actually be 'delivered by United States mail' to the IRS, not merely placed in a regular United States mail receptacle" (*ibid.*, quoting 26 U.S.C. 7502(a)(1)).[4] The Second Circuit, like the Sixth Circuit, has expressly rejected the contentions (i) that evidence of "a timely mailing of a return [by ordinary mail] constitutes a timely filing" (13 F.3d at 50) and (ii) that evidence of such mailing can suffice to establish the statutory requirement that the document be "actually delivered" (599 F.2d at 46).

If the fact that a document had been sent by ordinary mail were sufficient to create a presumption of delivery, Section 7502(c) of the Code would be "strip[ped] * * * of its purpose." *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1163 (8th Cir. 1990) (Lay, C.J., dissenting). There obviously would have been no need for Congress to provide that use of "registered" mail constitutes "prima facie evidence of delivery" under the detailed provisions of Section 7502(c)(1) if the use of ordinary mail were silently entitled to the same presumption. Such an interpretation of Section 7502 would not only be inconsistent with the "physical delivery" rule that preceded enactment of Section 7502 (see pages 6-7, *supra*), it would deprive Section 7502(c) of any rational meaning. The express creation of a presumption of delivery only for documents sent by registered or certified mail under Section 7502(c) negates the con-

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[4] Accord, *H.S. & H. Ltd.* v. *United States*, 18 Cl. Ct. 241, 246 (1989) ("The exceptions by which a taxpayer may prove timely filing when mailed are exclusively and completely outlined in § 7502."); *United States* v. *Cope*, 680 F. Supp. 912, 917 (W.D. Ky. 1987) ("The only two exceptions to the * * * physical delivery rule are contained in § 7502.").

tention that such a presumption may also apply when tax documents are sent by regular mail.

3. As the court of appeals recognized in this case (Pet. App. A6-A7), however, these decisions of the Second and Sixth Circuits conflict with decisions of the Eighth and Ninth Circuits.

a. In *Estate of Wood* v. *Commissioner*, the Eighth Circuit concluded that "[t]here is no reason that a presumption of delivery should not apply against the Commissioner under section 7502." 909 F.2d at 1159. The court noted that, prior to the enactment of Section 7502, the common law presumption of delivery that arises from proof of mailing had been applied in some cases involving statutory filing requirements for tax documents (see page 7, *supra*). The court reasoned that neither the history nor text of Section 7502 reflects that Congress desired "to completely displace the common law presumption of delivery" (909 F.2d at 1160).

The court in *Estate of Wood* did not, however, adopt the rule that evidence of mailing would create a presumption of delivery under Section 7502. Indeed, the court stated that "mere evidence of mailing" would not support a presumption of delivery (909 F.2d at 1161). The court stated that the text of Section 7502 reveals that "[t]he act of mailing is not significant for purposes of the statute but placement of a postmark is" (*ibid.*). The court opined that (*ibid.*)

> in section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed.

The court held that "only direct proof of postmark * * * will satisfy the requirements of the act" and concluded that, when such "direct proof of postmark" exists, it establishes "a presumption of delivery, which is rebuttable by the Commissioner." *Ibid.*[5] In what it admitted was an "extraordinarily rare" case, the Eighth Circuit determined that taxpayer was able to meet its burden in the form of testimony by the postmistress of a small town who remembered affixing postage to and hand-canceling the specific envelope in question on the specific date alleged by the taxpayer (*id.* at 1157, 1161). Because the Commissioner had failed to provide "any positive evidence" to support the assertion that "he did not receive the return" (*id.* at 1157), the court concluded on the record of that case that the presumption of delivery had not been rebutted (*ibid.*).

b. In *Anderson* v. *United States*, 966 F.2d at 490-491, the Ninth Circuit expressly adopted the rationale of *Estate of Wood* and expressly rejected the contrary decisions of the Second and Sixth Circuits in *Deutsch* and *Miller*. The court concluded in *Anderson* that the requisite "direct evidence" of a timely postmark required by *Estate of Wood* could be based on a taxpayer's assertion that "she actually saw the postal clerk stamp her document" (966 F.2d at 491). The court further held in *Anderson* that the "rebuttable presumption" of delivery created by "direct proof of a timely postmark" was not rebutted merely by the government's official "records of non-receipt." *Id.* at 491-492. The court held that such official evidence did

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[5] As Chief Judge Lay pointed out in his dissent in *Estate of Wood* v. *Commissioner*, 909 F.2d at 1162, however, "the plain language of the statute relegates the postmark to irrelevancy if the document is not delivered."

not rebut the presumption of delivery because the government had acknowledged that some "tax documents that had been mailed and delivered" to the Service were thereafter lost (*id.* at 492).

In *Lewis* v. *United States*, 144 F.3d 1220 (1998), the Ninth Circuit addressed this same issue in the context of an attorneys fee award under 26 U.S.C. 7430. In a split decision (Justice White, dissenting), that court interpreted the *Anderson* case as establishing the principle that, "if a taxpayer furnishes credible evidence of the date her letter to the Service was postmarked, the date is the date that controls." 144 F.3d at 1223. The court concluded that the taxpayers met that standard in that case (i) by presenting the testimony of the taxpayer that he mailed the document in question on the date that it was due and, on the same date, mailed a similar document to the State of California and (ii) by placing into evidence three signed checks issued on the due date, two of which were payable to and received by the IRS and one of which was payable to the State of California and cashed by the State on the following day. *Ibid.* The court reasoned that, because the Service had lost the envelope in which the document had been mailed, the agency (rather than the taxpayer) should bear any adverse inference to be drawn. *Id.* at 1222-1223. Justice White dissented, reasoning that *Anderson* should not be read to allow the testimony of the taxpayer to provide direct proof of a timely postmark. *Id.* at 1225.

4. Although these courts of appeals have reached conflicting interpretations of Section 7502, the present case is not an adequate vehicle for resolution of that conflict. This is because, under any of the conflicting interpretations of Section 7502, petitioners would not prevail on the facts of this case.

In both *Estate of Wood* and *Anderson*, the courts concluded that a presumption of delivery could arise under Section 7502(a) if there was "direct proof of postmark" (909 F.2d at 1161; 966 F.2d at 491). In the present case, however, petitioners offered no direct proof of postmark. Instead, we have essentially "the uncorroborated testimony of [petitioner Julian McDermott] who himself was unsure of the date of mailing" (Pet. App. A7). In similar circumstances, the Second Circuit in *Washton* reached the same conclusion reached by the court of appeals here and, in doing so, pointed out that the same conclusion would also have been reached in *Estate of Wood* and in *Anderson* because "[t]he taxpayers here offer[ed] no evidence beyond their own statement that they mailed the return." 13 F.3d at 50. Even under the analysis applied by the Eighth Circuit in *Estate of Wood*—and adopted by the Ninth Circuit in *Anderson*—such "mere evidence of mailing" is not a sufficient basis for a presumption of delivery to arise under Section 7502. *Estate of Wood* v. *Commissioner*, 909 F.2d at 1161; see also *Grable* v. *IRS*, 188 B.R. 595, 596 (Bankr. W.D. Mo. 1995). The *Lewis* case also does not aid petitioners because they offer no proof of the date of mailing.

Although a clear conflict exists among the decisions of the circuits that have interpreted Section 7502, resolution of that conflict would not affect the disposition of the present case. Under the view of all of the appellate courts that have thus far addressed this issue, the evidence offered in this case would not provide a sufficient basis for petitioners to prevail under the statute.[6]

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[6] One of the issues raised by petitioners (Pet. 18) is whether an IRS Certificate of Assessments and Payments (Form 4340) is

The present case thus does not present the precise issue on which the circuits have divided. Further review of the decision in this case therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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entitled to a presumption of correctness. Petitioners did not, however, address that issue in their brief in the court of appeals. They have thus waived the issue. *Simmons* v. *City of Philadelphia*, 947 F. 2d 1042, 1065 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992). The attack on the validity of the Form 4340 is, in any event, without merit. The Form 4340 is generated under seal and signed by an IRS officer. It is admissible into evidence as an official record of the United States and carries a presumption of correctness. *Hughes* v. *United States*, 953 F. 2d 531, 535 (9th Cir. 1992).